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IN THE

Supreme Court of the United States

October Term, 1970

No. 1046

DAVID BERNARD BARASH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
The Opinion of the Court	7
Reasons for Granting the Writ	9
1. The decision below conflicts with the decisions of this Court and those of other Circuits under which the sentence below of petitioner to a further prison term for the same offense is violative of the Fifth Amendment	9
2. The sentence of appellant to an additional term exceeded the power granted by Congress	13
3. The prior sentence imposed on appellant was illegal only as to the excessive fines and periods of probation	16
4. The decision below constitutes an impediment to appeals from illegal sentences such as to constitute a denial of due process	18
Conclusion	20
Appendix:	
Opinion Below of the Court of Appeals	1a
Prior Opinion of Court of Appeals	7a

PAGE

Tabulation of Resolution of Counts at Second Trial 17a

Judgment 18a

United States Constitution and Statutes Involved 19a

Cases Cited

Birch v. Anderson, 358 F. 2d 520 (D. C. Cir. 1965) 14

Bradley, In re, 318 U. S. 50, 63 S. Ct. 470 (1943) 8, 11

Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822 (1963) 12

Frankel v. United States, 137 F. 2d 736 (6th Cir. 1942) 12

Green v. United States, 356 U. S. 165, 78 S. Ct. 632 (1958) 14

Kennedy v. United States, 330 F. 2d 26 (9th Cir. 1964) 11, 17

Lange, Ex parte, 18 Wall. 163, 21 L. Ed. 872 (1874) 8, 10-13, 17

Michael, In re, 326 U. S. 224, 66 S. Ct. 78 (1945) 14

Moon v. Maryland, —— U. S. ——, 90 S. Ct. 1730 (1970) 18

Murphy v. Massachusetts, 177 U. S. 155, 20 S. Ct. 639 (1900) 17

North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072 (1969) 2-4, 7-9, 11, 17-20

Oksanen v. United States, 362 F. 2d 74 (8th Cir. 1966) 12, 15, 19

Roberts v. United States, 320 U. S. 264, 64 S. Ct. 113 (1943) 14

Page

Sullens v. United States, 409 F. 2d 845 (5th Cir. 1969) 12

United States v. Adams, 362 F. 2d 210 (6th Cir. 1966) 11, 12

United States v. Bean, 282 U. S. 304, 51 S. Ct. 113 (1931) 8-12

United States v. Cain, 404 F. 2d 936 (2d Cir. 1968) .. 4

United States v. Pridgeon, 153 U. S. 48, 14 S. Ct. 746 (1894) 16, 17

United States v. Walker, 386 F. 2d 428 (4th Cir. 1965) 12

Walsh v. United States, 374 F. 2d 421 (9th Cir. 1967) 12

Weber v. Willingham, 356 F. 2d 933 (10th Cir. 1966) 14

United States Constitution Cited

Fifth Amendment 3, 9, 13

Statutes Cited

18 U.S.C.:

Sec. 4161 13

Sec. 4161-4 3

Sec. 4162 14

Sec. 4163 14

Sec. 4164 14

26 U.S.C.:

Sec. 7214(a)(2) 4

28 U.S.C.:

Sec. 1254(1) 2

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DAVID BERNARD BARASH,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner David B. Barash prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 4, 1970.

Opinions Below

The opinion of the Court of Appeals, reprinted in the Appendix bound with this petition, is not yet officially reported. The penultimate opinion of the Court of Appeals vacating the previous sentence imposed on petitioner as an illegal increase on retrial after successful exercise of the right of appeal is reported at 428 F. 2d 328 (2d Cir. 1970).

The decisions in the Second Circuit dealing with the merits of the case—not involved in this petition nor the two aforementioned decisions below—appear at 412 F. 2d 26 (2d Cir. 1969), *cert. denied* 396 U. S. 832, 90 S. Ct. 86 (1969) (affirming petitioner's conviction after the second trial); 365 F. 2d 395 (2d Cir. 1966) (reversing petitioner's first trial conviction); and 266 F. Supp. 126 (S. D. N. Y. 1966) (denying various pre-second-trial motions).

Jurisdiction

The judgment of the Court of Appeals was entered on November 4, 1970. A timely petition for stay of the mandate was filed on or about November 17, 1970 and is still pending. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. When a federal criminal defendant has successfully appealed his sentence as to a constitutionally forbidden increase under this Court's decision in *North Carolina* v. *Pearce*,* may he thereafter be given an increased prison sentence for the same offense?

2. May a federal district judge, whose previous sentence was vacated by the Court of Appeals as a constitutionally forbidden deterrence of appeals from criminal convictions, thereafter increase his previously imposed prison sentence by fifty percent when the only intervening factor was the successful prosecution of the appeal from the first sentence?

3. After a federal prisoner has fully served his prison sentence, may he be resentenced for the same offenses to an additional term of imprisonment?

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* 395 U. S. 711, 89 S. Ct. 2072 (1969).

4. May a federal Court of Appeals sanction

(a) an increase in a prison sentence of 50%-100% in a case where the previous sentence had been vacated as violative of the principles of *North Carolina* v. *Pearce, supra*, and

(b) an increased sentence of the same dimension where the prisoner had already been released from prison as having fully served the prison sentences previously imposed for the same offenses before the increased sentences were imposed

on the ground that the Court of Appeals' order reversing the previous sentence as excessive directed vacation of the entire prior sentence instead of merely those portions concerning fines and periods of probation which it held excessive?

Constitutional and Statutory Provisions Involved

The Constitutional and statutory provisions involved, U. S. Const., Amendment V, 18 U.S.C. §§ 4161-4, are reproduced in the appendix to this petition.

Statement of the Case

This petition seeks correction of the sentence imposed on September 10, 1970 by the Hon. Inzer B. Wyatt, United States District Judge for the Southern District of New York, by the elimination therefrom of any additional period of imprisonment beyond the term that appellant has already completed.

After petitioner's first trial Judge MacMahon imposed a sentence of a year and a day concurrently on all counts

on which petitioner was convicted (A 17a).* After reversal of that conviction on appeal, 365 F. 2d 395, and a retrial which resulted in a conviction on only 15 of the 26 counts on which a conviction had been returned at the first trial, Judge Wyatt sentenced petitioner to a term of nine months imprisonment on the counts under 26 U.S.C. § 7214(a)(2), to suspended sentences of five years and two years on four other counts with five years probation, and to a total of $21,000.00 in fines on all counts (A 2a).** After that conviction was affirmed, 412 F. 2d 26, Judge Wyatt on November 18, 1969, reduced the term of imprisonment from nine months to seven months but allowed the remainder of the sentence to stand (A 3a) over the objection that the fines and lengthy terms of probation violated the principles of *North Carolina* v. *Pearce*, 395 U. S. 711, 89 S. Ct. 2072 (1969), and *United States* v. *Coke*, 404 F. 2d 836 (2d Cir. 1968).

On appeal from the denial of his motion to strike the provisions of the sentence as to the fines and probation, petitioner did not attack the underlying conviction but presented only this issue:

> "May a substantial fine and an extensive period of probation be imposed on conviction at a second trial after reversal on appeal of the first judgment of conviction in which no fine and no period of probation was imposed?" (Appellant's brief, 2d Cir., Docket No. 34477, p. 1)

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* References in the form "A—a" are to appellant's appendix. Pages A 1a-93a are to the appendix filed on appellant's previous appeal in Docket No. 34477. Pages A 94a-120a are to the additional appendix filed with the appeal below.

** See "Tabulation of Resolution of Counts at Second Trial" appended to this petition.

The Second Circuit held on that appeal:

> "Where, as in the present case, no basis or reason appears which would justify the court in imposing a more severe sentence after the new trial, the mere change in kind or type of punishment imposed after the new trial, as compared with that ordered after the first trial, presents difficulties and problems of its own. The combination of terms of imprisonment to be served, suspended sentences and maximum periods of probation, together with fines for part of which the appellant was to stand committed until paid, and the payment of the remainder of which was a condition of probation—all of which made up the punishments imposed after the second conviction—have to be compared with the concurrent sentences of one year and a day imposed on the counts after the first conviction.
>
> • • •
>
> "As an exercise of our supervisory power over the administration of federal justice we, therefore, hold that after retrial, a sentencing judge is bound, absent the justifying circumstances set out in *Pearce* and *Coke*, to follow the kind, as well as to stay within the bounds of the degree of severity, of the punishment imposed following the first trial, unless there are extremely compelling reasons which demand a change in the type of penalty in the interests of justice, in which event such reasons shall fully and affirmatively appear on the record. Thus while he may impose a lesser amount of whatever punishment was set the first time around, no exchange may be made between the various types of available penalties, except that the execution of such identical or lesser sentence may be suspended

and a term of probation imposed." 428 F. 2d at 332, 332

The Circuit Court remanded the case "for resentencing in a manner consistent with this opinion, that is to say, to fix sentences which are equal to or less than imprisonment for one year and one day, without the imposition of any fine, giving the appellant credit for the time during which he has been actually imprisoned." 428 F. 2d at 332. The date of that order of remand was June 17, 1970. 428 F. 2d at 328. However, by that time petitioner had already been released from prison since he had served the full term of seven months imposed by Judge Wyatt prior to that appeal (A 3n, 116n).

When petitioner again came before Judge Wyatt on September 10, 1970 for resentence this was the fourth time that petitioner had been before the District Court for sentence in the same case. Judge Wyatt increased the term of imprisonment from seven months to ten months (A 108n). An oral and written report from the probation officer indicated that petitioner's conduct since the imposition of the seven months sentence had been wholly exemplary (A 116n-17n).

Judge Wyatt at the time of the resentencing below stated (A 111n) that he had read the memorandum of law submitted by petitioner's counsel (A 97n-107n) which pointed out, *inter alia*, that the court had no jurisdiction to impose a further sentence of imprisonment on the defendant Barash since he had already completed service of the prison sentence previously imposed by the court on the same conviction. Other than this statement by Judge Wyatt, he made no further reference to the memorandum or the authorities discussed.

The Opinion of the Court

The Court of Appeals held that the principles enunciated by this Court in *Pearce* do not apply to an increase in a prison sentence after a successful appeal on *Pearce* grounds where there have been no intervening circumstances other than that successful appeal. ___ F. 2d ___, Slip Sheet (Op. pp. 204, 205).* The Court of Appeals said:

> "The appellant again refers to a number of cases in which it was held to be double jeopardy for a court to increase a sentence of imprisonment after the defendant had commenced serving the sentence first imposed upon him. None of these cases concerned or arose in the context of the application of the principle enunciated in *Pearce* and *Rice*. In those cases the Court in effect ordered the reinstatement of the original sentences imposed after the first trial and conviction.
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> • • •
>
> "We conclude that, for the purpose of applying the principle of the *Pearce* and *Rice* cases, the imposition by the district court of the concurrent 10 month sentences on 11 counts, against which the seven months already served by the appellant** were credited, does not on the facts and circumstances of this case constitute double jeopardy." (Ibid.)

In response to petitioner's argument that imposition of the ten month term of imprisonment after petitioner had

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* See copy of opinion appended to this petition.

** I.e., the entire seven month term of imprisonment had been served by petitioner prior to the imposition of the ten month term.

fully completed service of the seven month sentence imposed after the second trial was contrary to this Court's decision in *Ex parte Lange*, 18 Wall. 163 (1874); *United States* v. *Benz*, 282 U. S. 304, 51 S. Ct. 113 (1931); *In re Bradley*, 318 U. S. 50, 63 S. Ct. 470 (1943); and *North Carolina* v. *Pearce*, 395 U. S. 711, 717 n. 11, 89 S. Ct. 2072, 2076 n. 11 (1969); and decisions in other Circuits, the Court of Appeals held below:

> "But the appellant cannot invoke his right to have the more severe sentences imposed after his conviction on a new or second trial reduced to a penalty which does not exceed the sentence imposed after his first conviction and in the next breath assert that the court has no power to do this because he has paid some portion of the second conviction penalty through serving part or all of an illegally imposed sentence or has paid all or part of an illegally exacted fine." —— F. 2d at ——, Slip Sheet Op., p. 295.

The Court of Appeals also held that there could be no objection to the imposition of the ten month sentence, since on four of the counts (8, 10, 18 and 20) petitioner had never received a lesser sentence on those counts than the year and a day imposed by Judge MacMahon on the first-overturned-conviction. However, after the second trial, petitioner, in fact, received a suspended sentence on these four counts.

The Court of Appeals made no response to petitioner's argument that allowing the district court to impose a greater term of imprisonment on petitioner after the successful appeal of the fine and probation terms of his prior sentence as excessive under *Pearce* would make a reality of "the very threat inherent in the existence of such a

punitive policy [which] would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights' ", *North Carolina* v. *Pearce*, 395 U. S. at 724, 89 S. Ct. at 2080.

Reasons for Granting the Writ

1. The decision below conflicts with the decisions of this Court and those of other Circuits under which the sentence below of petitioner to a further prison term for the same offense is violative of the Fifth Amendment.

In *United States* v. *Benz*, 282 U. S. 304, 307, 51 S. Ct. 113, 114 (1931), this Court held:

> "The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be 'in the breast of the court' making them, and subject to be amended, modified, or vacated by that court. Goddard v. Ordway, 101 U. S. 745, 752, 25 L. Ed. 1040. The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented. In re Lange, 18 Wall. 163, 167-174, 21 L. Ed. 872; Bassett v. United States, 9 Wall. 38, 19 L. Ed. 548. . . .
>
> "The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court had lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment

to the Constitution, which provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' This is the basis of the decision in Re Lange, supra." 282 U. S. at 307, 51 S. Ct. at 114

Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872 (1874), on which *Benz* relies, resulted in the freeing of Lange who had fully served a valid portion of a sentence which in its total provisions exceeded the legal limit. Originally, Lange had been sentenced to a fine and imprisonment under a statute which provided the imposition of either type of punishment but not both. After Lange served a valid portion of the sentence by paying the fine, the trial court vacated the original judgment and resentenced him to the term of imprisonment previously imposed. This Court held:

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield, and forbade that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of juris-

> prudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error because the power to render any further judgment did not exist." 18 Wall. at 176, 21 L. Ed. at 878-9

See also *In re Bradley*, 318 U. S. 50, 63 S. Ct. 470 (1943).

These decisions were reaffirmed by this Court in *North Carolina* v. *Pearce*, 395 U. S. at 717 n. 11, 89 S. Ct. at 2076 n. 11, where it was held "the Fifth Amendment guarantee against double jeopardy . . . protects against multiple punishment for the same offense." Ibid.

Many decisions of other Circuits, following *Benz* and *Lange*, have voided increased prison sentences imposed after the defendant has commenced or, as here, completed a valid term for the same offense. Of those cases, *United States* v. *Adams*, 362 F. 2d 210 (6th Cir. 1966), and *Kennedy* v. *United States*, 330 F. 2d 26 (9th Cir. 1964), were also cited in footnote 11 of the *Pearce* opinion as correct application of *Benz* and *Lange*. In *Kennedy*, the trial court sought to make a similar "correction" of sentences which the defendant had commenced serving by reducing an illegal term of ten years to the five year maximum but making that term consecutive to other legal sentences rather than concurrent as originally imposed. This, too, was struck down on appeal even though the second sentence was for the same total maximum term as the original sentences and the trial court could have achieved that total by originally making the valid portion of its judgment consecutive rather than concurrent. 330 F. 2d at 27-30. *United States* v. *Adams*, *supra*, is an even

more striking application of the rules. Adams was originally sentenced to terms of ten years on a count for which the maximum was five, and one year on a count for which the maximum was ten. The sentence was "corrected" by raising the sentence to ten years on the latter count and reducing it to one year, concurrent, on the former. 362 F. 2d at 210-11. The Court of Appeals held this violative of *Lange* and ordered Adams' release as he had completed service of one year's imprisonment.

So rigidly enforced has been the rule against multiple punishments, that even where the judgment or order reducing a sentence upon which the defendant has commenced service is itself *invalid*, the reduced term becomes the ceiling for all further proceedings in the case. *Sullens* v. *United States*, 409 F. 2d 545 (5th Cir. 1969); *United States* v. *Walker*, 346 F. 2d 428 (4th Cir. 1965); *Walsh* v. *United States*, 374 F. 2d 421 (9th Cir. 1967). Once the defendant has served the full term on the minimum term in the series of sentences imposed, he is entitled to immediate release. *Sullens* v. *United States*, 409 F. 2d at 546, 548. See also *Frankel* v. *United States*, 131 F. 2d 756 (6th Cir. 1942); *Oksanen* v. *United States*, 362 F. 2d 74, 81 (8th Cir. 1966); and *United States* v. *Adams*, *supra*.

Where there is a retrial, the trial court under certain circumstances may impose an increased sentence, *North Carolina* v. *Pearce*, *supra*, but where there has been no retrial and the defendant has fully served a penalty permissible under the statute for which he has been sentenced, the trial court has no jurisdiction to impose an increased sentence. *United States* v. *Benz*, *supra*; *Ex parte Lange*, *supra*; See *Fay* v. *Noia*, 372 U. S. 391, 451, 83 S. Ct. 822, 855 (1963).

Thus, the Second Circuit's decision below is in conflict with long-established precedents in this Court and in near-

ly every other circuit which hold that to impose an additional term of imprisonment on a defendant for the same offenses on which he has already fully served a lesser prison term previously imposed, as did petitioner, is a violation of the Fifth Amendment guarantee against double jeopardy. This Court in *Ex parte Lange, supra*, forbade exactly what was done below:

> "The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal, is manifest." 18 Wall. at 168, 21 L. Ed. at 876.

2. The sentence of appellant to an additional term exceeded the power granted by Congress.

By the calendar, petitioner's seven month sentence would have been completed not later than June 24, 1970. By *statute*, his sentence was completed on May 8, 1970. As petitioner "faithfully observed all the rules," he was entitled to a credit of five days per month against his sentence pursuant to 18 U.S.C. §4161 and received that credit, a total of 30 days. As appellant had performed "exceptionally meritorious service" and "duties of out-

standing importance in connection with institutional operations" during his incarceration, he was entitled to be considered for an additional credit of three days per month pursuant to 18 U.S.C. §4162, which he received, totaling eighteen days. Pursuant to 18 U.S.C. §4163, once the aforesaid credits against the sentence have been made, a prisoner's release is mandatory. See *Weber* v. *Willingham*, 356 F. 2d 933 (10th Cir. 1966). Since on May 8, 1970 there was less than 180 days left of petitioner's seven month sentence, pursuant to 18 U.S.C. §4164, his release on that date was unconditional and not on parole. See *Birch* v. *Anderson*, 358 F. 2d 520 (D. C. Cir. 1965). When a prisoner has been released within the 180 day period provided by Section 4164, "he is on unconditional release and his sentence is entirely terminated." 358 F. 2d at 527. Once a defendant has completed his sentence under these statutes, as did petitioner, "he is entitled to his liberty from the detention involved in this case." 358 F. 2d at 527.

Any federal court's power to direct imprisonment of a defendant before it is limited by the statutes which Congress has enacted, see *Roberts* v. *United States*, 320 U. S. 264, 64 S. Ct. 113 (1943), even in the area of criminal contempt. See *Green* v. *United States*, 346 U. S. 165, 171, 78 S. Ct. 632, 636 (1958); *In re Michael*, 326 U. S. 224, 227, 66 S. Ct. 78, 79 (1945).

Once petitioner had completed his sentence of seven months, on May 8, 1970, pursuant to the aforecited statutes which Congress enacted, there was no jurisdiction to sentence appellant, on September 10, 1970, further on the same conviction or anything relating thereto. *Birch* v. *Anderson, supra.* The September 10, 1970 resentencing of petitioner is exactly what was condemned by the Eighth

Circuit in *Oksanen* v. *United States*, 362 F. 2d 74, 80-81 (8th Cir. 1966):

> "It could be argued that appellant's first sentence was wholly void because the denial of counsel deprived the Court of jurisdiction to act. Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Therefore, in contemplation of law appellant had not yet been sentenced when the trial court acted in July 1965. Though it has a certain logical appeal, this argument ignores the factual realities of the situation. Appellant was in fact punished by the power of the United States Government. Through its ostensible authority the District Court sentenced appellant to a period of probation. This probation carried conditions which severely limited appellant's freedom. His activities were under the supervision and control of agents of the United States Justice Department, who were acting under color of law pursuant to an order of the United States District Court. This probation is a punishment tantamount to imprisonment, United States v. Rosenstreich, 204 F. 2d 321 (2 Cir. 1953). The Government may not now wash its hands of this punishment as though it never took place and suffer appellant to be punished again. Lenient as it was, appellant has been punished by the Government to the full extent thought necessary by the District Judge in 1958. The Constitution will not allow the Court to punish him a second time.
>
> "The trial court seemed to hold that when appellant sought relief from his conviction he waived his privilege against double jeopardy. We do not believe this holding is justified. The law declares that certain sentences are illegal, and the law pro-

> vides an avenue by which the illegal sentences may be attacked. The law may not now ambush with the threat of repeated punishment the person who attempts to claim his constitutionally protected rights. 362 F. 2d at 80-81.

It is respectfully submitted that the decisions of this Court and in other Circuits, contrary to the decision below, hold that the district court had no power to sentence petitioner to an additional prison term and that the imposition of such further sentence constituted double jeopardy and a denial of due process.

3. The prior sentence imposed on appellant was illegal only as to the excessive fines and periods of probation.

In *United States* v. *Pridgeon*, 153 U. S. 48, 62, 14 S. Ct. 746, 751 (1894), the petitioner claimed that the provision of his sentence as to hard labor exceeded the authority of the sentencing court, just as petitioner contended on his prior appeal that his sentence as to fine and probation *in addition* to the seven month prison term exceeded his sentence after the first trial. This Court in *Pridgeon* stated how such a sentence should be construed:

> "Without undertaking to review the authorities in this and other courts, we think the principle is established that, where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over

> the person and offense, and only void as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence." 153 U. S. at 62, 14 S. Ct. at 751, citing *Ex parte Lange, supra.*

On the prior appeal in this case, 428 F. 2d at 332, the Second Circuit held that the sentence imposed by Judge Wyatt after the second trial was excessive to the extent of the fines and periods of probation on long suspended sentences *in addition to* the prison term of seven months. *Kennedy* v. *United States*, 330 F. 2d 26 (9th Cir. 1964), cited as controlling authority in *North Carolina* v. *Pearce*, 395 U. S. at 724, 89 S. Ct. at 2071-2. The express absence following *Pridgeon*:

> "The initial sentences imposed for the breaking and entering counts were not absolutely void but were void only as to the illegal or excessive portions thereof." 330 F. 2d at 27

The fact that Kennedy was credited with the time he had served, 330 F. 2d at 27, did not legitimize the increased sentence.

The increased sentence of imprisonment increased a provision of the judgment against appellant as to which he did *not* request review rendering the increased prison sentence, *in invitum*, which is certainly forbidden by *Murphy* v. *Massachusetts*, 177 U. S. 155, 160, 20 S. Ct. 639, 641 (1900).

Again, the decision below departs from the principles of fundamental fairness essential to valid sentencing in federal criminal cases established by this Court and the other Circuits.

4. The decision below constitutes an impediment to appeals from illegal sentences such as to constitute a denial of due process.

The basic rationale of the *Pearce* decision is that the exercise of the right of appeal should remain unfettered by the threat of an increased sentence attendant thereon, absent evidence of other antisocial conduct of the defendant occurring after the date of the first trial judgment. 395 U. S. at 724-89 S. Ct. at 2071-2. The express absence of such conduct on the part of petitioner was noted by the Second Circuit on the previous appeal, 428 F. 2d at 331, and by the district court at appellant's sentence on September 10, 1970 (A 115a-17a).

In *Moon* v. *Maryland*, —— U. S. ——, 90 S. Ct. 1730 (1970), this Court held that due process required that the right of appeal in a criminal case must not be stultified through fear of vindictive increases of prison terms should the appeal prove successful:

> "'In order to assure the absence of such a motivation,' we held that 'whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' *Id.*, at 726, 89 S. Ct. at 2081." —— U. S. at ——, 90 S. Ct. at 1730.

The only reason given by the district judge for sentencing petitioner to an additional prison term, the only identifiable conduct of petitioner mentioned by the district judge, was petitioner's prosecution of the appeal which held the sentence previously imposed by the same judge illegal (A 114a-15a).

It is clear that appellant would not have received an increased prison sentence but for his last appeal which attacked only the legality of the fine and imprisonment terms of his sentence (see A 104a-07a). This clearly violates the principles of *Pearce*. It is also a violation of due process to sentence a defendant to increased imprisonment when he has served the full term under a previous illegal sentence. *Oksanen* v. *United States*, 362 F. 2d at 81.

It is true that the district judge who sentenced petitioner did not *say* he was punishing him for securing an appellate declaration that the same judge's prior sentence was illegal. However, as this Court noted in *Pearce*, such direct proof is rarely available.* Petitioner and all other

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*"The existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case. But data have been collected to show that increased sentences on reconviction are far from rare. See Note, Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional Waiver Theory, 1965 Duke, L.J. 395. A touching bit of evidence showing the fear of such a vindictive policy was noted by the trial judge in *Patton* v. *North Carolina*, 256 F. Supp. 225, who quoted a letter he had recently received from a prisoner:

'Dear Sir:

'I am in the Mecklenburg County jail. Mr. _____ chose to re-try me as I knew he would.

• • •

'Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probability I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners.

(*Footnote continued on following page*)

prospective appellants who believe portions of their sentences to be illegal are most likely to be affected by what the sentencing judge does rather than what he says. There can be little question that the increased prison sentence meted out to petitioner for no other reason than his appeal of the illegal (non-prison) terms of his previous sentence constitutes a clear warning to all prospective appellants that the *Pearce* rule does not apply in the Second Circuit to appeals from illegal provisions of sentences. There could scarcely be placed a more biting judicial chill on the exercise of those appellate rights.

It is respectfully submitted that the decision below does not meet the test of due process.

CONCLUSION

For these various reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS BENDER,
Attorney for Petitioner.

LLOYD A. HALE,
Of Counsel.

(*Footnote continued from preceding page*)

'Your Honor, I don't want a new trile I am afraid of more time • • •

'Your Honor, I know you have tried to help me and God knows I apreceate this but please sir don't let the state retry me if there is any way you can prevent it.'

Very truly yours'

Id., at 231, n. 7." 395 U. S. at 725 n. 20, 89 S. Ct. at 2080 n. 20.

APPENDIX

Opinion Below of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 347—September Term, 1970.

(Argued October 20, 1970 Decided November 4, 1970.)

Docket No. 35449

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID B. BARASH,

Appellant.

Before:

HAYS, ANDERSON and FEINBERG,

Circuit Judges.

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[291]

Appeal by the defendant, Barash, from concurrent sentences of 10 months each on fifteen counts of the indictment in the United States District Court, Southern District of New York, Wyatt, *Judge*, imposed following remand by this court after declaring sentences previously ordered were illegal. Barash claims double jeopardy because, before such declaration, the defendant had completed serving the 7-month portion of the sentence illegally imposed on eleven of the fifteen counts. Affirmed.

Opinion Below of the Court of Appeals

[292]

LLOYD A. HALE, Esq., New York, N. Y. (Louis Bender, Esq., New York, N. Y., on the brief), *for Appellant.*

JAMES T. B. TRIPP, Assistant U. S. Att'y, Southern District of New York (Whitney North Seymour, Jr., U. S. Attorney, and Gary Naftalis, Assistant U. S. Att'y, Southern District of New York, on the brief), *for Appellee.*

PER CURIAM:

At the time the prior appeal, which challenged the legality of the sentences ordered by the district court on November 18, 1969, was argued before this court on April 28, 1970, Barash was serving concurrent sentences of seven months on each of 11 out of 15 counts[1] of the indictment. On each of these 11 counts the district court had also ordered the payment of a fine of $1000 for which he was to stand committed until paid.[2] In this court's decision of June 17, 1970

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[1] The 11 counts were 21 through 26 inclusive and 28 through 32 inclusive. On the other four counts which were counts 8, 10, 18 and 20, the court imposed 5 years imprisonment, suspended and 5 years probation on counts 8 and 10; and imposed 2 years imprisonment, suspended and 5 years of probation on counts 18 and 20. The sentences in these four counts were to run concurrently with each other but not with the sentences imposed on the eleven counts.

[2] Following the district court's amended judgment of November 18, 1969 the appellant paid his total fines of $21,000. After the judgment of November 18, 1969 was set aside by this court on June 17, 1970, the Clerk of the District Court on August 20, 1970 fully reimbursed the appellant for the $21,000 paid.

(428 F. 2d 328) all of the sentences, covering the 15 counts (more particularly described in the opinion), imposed after the second trial, of which the seven months of imprisonment were only a part, were declared illegal and void be-

[293]

cause they exceeded the penalty of concurrent sentences of one year and one day imposed by the district court on these counts after Barash's original conviction. Our decision was governed by *United States* v. *Coke*, 404 F. 2d 836 (2 Cir. 1968), and the Supreme Court holdings in *North Carolina* v. *Pearce* and *Simpson* v. *Rice*, 395 U. S. 711 (1969). In that decision we considered and disposed of the appellant's claim that he was then serving concurrent sentences of seven months imprisonment, plus $11,000 in fines, imposed by the district court on November 18, 1969, and that a reimposition of the original sentence, ordered after his first trial, of one year and a day would place him in double jeopardy, as, he asserts, any increase over the seven months he was serving would do even though he was given full credit for the time he had served. We held that where Barash had invoked the *Coke*, *Pearce* and *Rice* cases to reduce and correct the sentences imposed on him on November 18, 1969, as illegal, because they were greater than the concurrent one year and one day sentences imposed on him after his first trial and conviction, the district court on remand could impose any sentence equal to or less than the original one year and one day sentences, provided Barash were credited with the time actually served. We further held that any sentence less than the one year and one day but more than what he had actually served would not constitute double jeopardy.

Opinion Below of the Court of Appeals

On remand the district court, on September 10, 1970, imposed concurrent sentences of 10 months on each of the 15 counts.

The only difference in the present facts of the case as now disclosed to us is that Barash, due to the crediting of good time earned, completed his seven months imprisonment a short time prior to the date of our decision, June

[294]

17, 1970.[3] This is not a significant difference, and our holding that he is not entitled to have his sentences limited to the seven months he elected to serve must stand as fully adjudicated in our prior decision.

The appellant again refers to a number of cases in which it was held to be double jeopardy for a court to increase a sentence of imprisonment after the defendant had commenced serving the sentence first imposed upon him. None of these cases concerned or arose in the context of the application of the principle enunciated in *Pearce* and *Rice*. In those cases the Court in effect ordered the reinstatement of the original sentences imposed after the first trial and conviction. While in those cases the prisoners had served more than the original sentences called for and were released, there is no reason to suppose that in the present case this court could not have ordered the reinstatement of the one year and one day sentences. Rather than do so, this court remanded the case to the district

[3] The full seven months of imprisonment would have been completely served by the appellant on June 24, 1970. The opinion and judgment of this court were filed on June 17, 1970. Because of earned good time, the appellant was actually released on May 8, 1970. Pending the resolution of the issues which are the subject matter of this appeal, he is at large on bail.

court so that it could consider any new extenuating circumstances which may have come to light and exercise its discretion in ordering a lesser sentence. Both the principle of *Pearce* and *Rice* and our remand for consideration of a lesser penalty were designed for the benefit of the convicted man.

On the previous appeal, decided in his favor, he argued that the penalties affixed to the 11 counts, i.e. concurrent sentences of seven months, plus $11,000 in fines, plus the order that he stand committed for an indefinite period until the fines were paid, constituted an increase in punish-

[295]

ment over the bench mark allowed by the principle of the *Pearce* and *Rice* cases, which was the original sentence of a year and a day. He now argues that because he has served the seven months imprisonment which he describes as the "legal" portion of these otherwise invalid multiple provision penalties,[4] he cannot be given a sentence in excess of seven months; and that, while the court must declare illegal and relieve him of all of the other provisions of the penalties except the seven months term of imprisonment, it is barred from reinstating the original sentence or any lesser sentence between seven months and the original one year and one day. But the appellant cannot in-

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[4] To show consistency with his claim that the seven months sentences imposed on eleven of the counts were "legal," he asserts in his present brief that he never appealed from the seven months imprisonment portion of the sentences but only from the fines and terms of probation. His notices of appeal and motion for correction and reduction of sentences made no such distinction. In our opinion of June 17, 1970, we expressly stated that the motion for correction was directed at the sentences "including the time to be served, the fines, suspended sentences and probation with its conditions, ..."

voke his right to have the more severe sentences imposed after his conviction on a new or second trial reduced to a penalty which does not exceed the sentence imposed after his first conviction and in the next breath assert that the court has no power to do this because he has paid some portion of the second conviction penalty through serving part or all of an illegally imposed sentence or has paid all or part of an illegally exacted fine.

We conclude that, for the purpose of applying the principle of the *Pearce* and *Rice* cases, the imposition by the district court of the concurrent 10-month sentences on 11 counts, against which the seven months already served by the appellant were credited, does not on the facts and circumstances of this case constitute double jeopardy.

[296]

There also remain the other four counts, 8, 10, 18 and 20 which are not concerned with the claims made by the appellant about the seven months imprisonment imposed on the other 11 counts. In the district court's judgment of November 18, 1969, two of these four, carried sentences of five years and two of two years, all with suspension, probation and fines, of which the sentences were to run concurrently with each other but not with the other 11 counts. The appellant does not pluck out some portion of these penalties and call it "legal." On remand the district court, on September 10, 1970, imposed concurrent sentences of 10 months on each of the four counts and Barash was credited with the seven months which he had served, which in effect made the service of the sentences on the four counts concurrent with service of the sentences on the 11 counts. But Barash was never sentenced to less than 10 months on the four counts and the appellant has offered no persuasive reason why he should not serve the remaining three months on those counts.

The judgment of the district court is affirmed.

Prior Opinion of Court of Appeals

428 F. 2d 328 (2nd Cir. 1970)

[328]

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID B. BARASH,

Appellant.

No. 728, DOCKET 34477.

United States Court of Appeals,
Second Circuit.

Argued April 28, 1970.

Decided June 17, 1970.

[329]

Lloyd A. Hale, New York City (Louis Bender, New York City, on the brief), for appellant.

James T. B. Tripp, Asst. U. S. Atty., Southern Dist. of New York (Whitney North Seymour, Jr., U. S. Atty.; and Jack Kaplan, Asst. U. S. Atty., Southern Dist. of New York, on the brief), for appellee.

Before:

HAYS, ANDERSON and FEINBERG,

Circuit Judges.

ANDERSON, Circuit Judge:

Prior Opinion of Court of Appeals

The appellant, David B. Barash, was convicted on 26 of the 32 counts of an indictment which charged him with payment of bribes or illegal gratuities to five employees of the Internal Revenue Service, in violation of 18 U.S.C. §§ 2, 201, 201(b) and 201(f) and of 26 U.S.C. § 7214(a)(2). On January 28, 1966, he was sentenced to one year and one day on each of the counts on which he was convicted, all to be served concurrently. On appeal these judgments of conviction were reversed by this court and the case was remanded for a new trial. United States v. Barash, 365 F. 2d 395 (2 Cir. 1966). As the result of the second trial before a different judge and jury, Barash was convicted again on 15 out of the 26 counts. On December 8, 1967, he was sentenced to concurrent terms of nine months imprisonment and fined $1000 on each of 11 counts; to concurrent terms of five years, suspended, and

[330]

five years of probation, with fines of $2500, on each of two other counts; and to concurrent terms of two years, suspended, and five years probation, with fines of $2500, on each of the two remaining counts. Barash was to stand committed until all of the $1000 fines were paid, and payment of the $2500 fines was a condition of the probation in each instance in which it was imposed. The two year sentences were concurrent with the five year sentences which in turn were consecutive to the nine month sentences. Barash appealed his conviction in the second trial but made no attack upon the sentences or fines; and this Court affirmed. United States v. Barash, 412 F. 2d 26 (2 Cir.), cert. denied 396 U. S. 832, 90 S. Ct. 86, 24 L. Ed. 2d 82 (1969).

While Barash's appeal from judgments entered after his second trial were *sub judice* before a panel of this court,

the court, on November 27, 1968, filed its en banc decision in United States v. Coke, 404 F. 2d 836 (2 Cir. 1968). The court held, in the exercise of its supervisory powers and for the purpose of establishing a uniform practice, that the punishment imposed on a convicted accused, following retrial after a new trial has been ordered, cannot be greater than the punishment imposed by the court after his first trial unless, in the light of his conduct since sentence was initially passed, or in view of new information which had not come to the attention of the judge imposing the first sentence because of some action chargeable to the defendant, and increased punishment is warranted and the judge specifies the reasons for it on the record. On June 23, 1969, the Supreme Court decided two cases in one opinion, North Carolina v. Pearce and Simpson, Warden v. Rice, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), which dealt with the same issue and reached the same result as this court did in *Coke* but based the decisions on the Due Process Clause of the Fourteenth Amendment rather than on the supervisory power.

Barash was denied certiorari on his direct appeal and thereafter on November 13, 1969 he moved in the District Court under Rule 35, F.R.Crim.P. for the correction and reduction of his sentence on the ground that the punishment, including the time to be served, the fines, suspended sentences and probation with its conditions, was more severe than the punishment meted out after his first trial. The district court reduced the time to be served from 9 to 7 months but otherwise denied the motion on the assumption that the holdings in *Coke* and *Pearce* apply only to sentences of imprisonment and do not apply to fines or to sentences suspended as part of an order for a pe-

riod of probation. We are of the opinion that this was error.

[1] It should be expressly pointed out, however, that there is not the slightest suggestion or shred of evidence of any vindictiveness on the part of the sentencing judge following the second trial. Moreover he reduced the period of imprisonment immediately to be served from a year and a day to seven months. But on review this court must consider the maximum which the appellant might be required to serve under the terms of the judgment.

[2] In countering appellant's contention that his second sentence is illegal because of its increased severity, the Government argues that Barash waived his right to complain of the illegality of the sentence because of his failure to raise the issue on his appeal from the second con-

[331]

viction.[1] Although neither *Coke* nor *Pearce* had yet been decided at the time of that appeal, it is urged that because the appellant "knew of the tide of legal opinion" that eventually produced those decisions, his failure to

[1] The Government, quite correctly, does not attempt to argue that these principles should not be given retroactive application. At the time of the *Coke* decision we determined that its principles were to apply "to all federal defendants who after successful appeal were convicted and given a longer sentence." 404 F. 2d at 848. The Supreme Court, however, has yet to rule on the retroactivity of its decision in *Pearce*. It is nevertheless not necessary for us to reach the question of the retroactivity of *Pearce*, for as Barash is a federal prisoner he is fully protected by our decision in *Coke*. But cf. Pinkard v. Neil, 311 F. Supp. 711, (M. D. Tenn. April 15, 1970) (applying *Pearce* retroactively to state prisoners).

raise the point constituted an "intentional relinquishment" of any right to have his illegal sentence corrected. We disagree. Under Rule 35, F.R.Crim.P., an illegal sentence may be corrected by the court "at any time." See 8A J. Moore, Federal Practice ¶ 35.03 [1] (1969). *Coke* explicitly held that a more severe sentence following a second trial (absent justifications not here present) is "illegal" within the meaning of Rule 35 as "it would violate a standard enunciated under our power to supervise the administration of federal justice." 404 F. 2d at 848. It follows that a district court may not be precluded from exercising its duty to correct an unjustified increased punishment because of the defendant's failure to raise the point on direct appeal.

[3] With regard to the merits, we think it clear that the district court's determination that the holdings in *Pearce* and *Coke* are limited to increased prison terms is incorrect. The rationale behind those decisions is that a convicted criminal defendant, fearing a declared or undeclared state policy to discourage attacks on judgments of conviction or that a vindictive judge might increase his sentence following retrial if there were a reversal on appeal, might be deterred from exercising his right to appeal or his right collaterally to attack his conviction. North Carolina v. Pearce, 395 U. S. at 725, 89 S. Ct. 2072; United States v. Coke, 404 F. 2d at 848. We are of the opinion that the fear that the second judge might impose a substantial fine or an additional prison term, suspended with long term probation, and, by either or both of these means, increase the punishment over the term of imprisonment ordered after the first conviction, would likewise deter appeals just as certainly as an increase in the prison term itself. See ABA Project on Minimum Standards

for Criminal Justice, Standards Relating to Appellate Review of Sentences § 3.4 at 65-66 (Approved Draft, 1968); Note, The Supreme Court: 1968 Term, 83 Harv. L. Rev. 7, 187-92 (1969). We, therefore, hold that the rules enunciated in *Pearce* and *Coke* prohibit (absent the justifications there enumerated) an increase in the punishment imposed after a conviction on retrial regardless of the form of punishment, whether it is imprisonment, suspended sentence with probation, fine, see North Carolina v. Pearce, 395 U. S. at 718, n. 12, 89 S. Ct. 2072, or any other corrective measure the court may provide.

[4] Where, as in the present case, no basis or reason appears which would justify the court in imposing a more severe sentence after the new trial, the mere change in kind or type of punishment imposed after the new trial, as compared with that ordered after the first trial, presents difficulties and problems of its own. The combination of terms of imprisonment to be served, suspended sentences and maximum periods of probation, together with fines for part of which the appellant was to stand committed until paid, and the payment of the remainder of which was a condition of probation—all of which made up the punishments imposed after the second conviction—have to be compared with the concurrent sentences of one year and a day imposed on the counts after the first conviction. The appellant claims that those ordered after the new trial were the more severe. The Government takes the position that they were not. There is some evidence that the court after retrial was seeking to deal more leniently with the appellant—at least so far as the terms of imprisonment ordered to be served were concerned. If the appellant were unable to pay his fines, however, his

[332]

terms of imprisonment might have far exceeded those first imposed, and would have been, therefore, more severe than those ordered after the first trial. Any attempt to compare one kind of punishment with another and to pronounce one more or less severe than another under circumstances such as those in this or similar cases is wholly impractical. It is simply not possible to compare a fine with a prison term and determine with any degree of accuracy which is the more severe. See e.g., United States v. Kelley, 5 U. S. C. M. A. 259, 263-64 (1954) (concuring opinion); United States v. Christensen, 12 U. S. C. M. A. 393 (1961).[2] In addition to the diffi-

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[2] This problem has received most extensive consideration in opinions of the Court of Military Appeals, because the convening authority has the power to review sentences of courts-martial under 10 U.S.C. § 864 (formerly 50 U.S.C. § 651) and there is also a provision, 10 U.S.C. § 863(b) (formerly 50 U.S.C. § 650(b)), that, with certain exceptions, "no sentence in excess of or more severe than the original sentence may be imposed" if the convening authority disapproves of the sentence set by the court-martial. In his concurring opinion in *Kelley* the late Judge Brosman noted the difficulty of comparing for severity various types of sentences:

> "It would seem to follow that it is open to a court-martial to find punishments, if any, no more severe than that previously adjudged *within* each category—but that its members may not go *outside* that category's limits. And why? For the plain reason that, as a logical proposition one may not—one cannot save for the roughest sort of practical purpose—compare chalk with cheese.
>
> "For purposes of administrative simplicity, therefore, I believe that no effort should be made to equate wholly different types of penal action." 5 U.S.M.C.A. at 264.

culties of comparison, the inevitable result of permitting the second judge to perform such a trade-off between kinds and types of punishment would be innumerable appeals, putting this court knee-deep into the business of sentencing by requiring it to declare what punishment is the equivalent or less rigorous than some other punishment, and thus participate significantly in the fixing of penalties.

[5] As an exercise of our supervisory power over the administration of federal justice we, therefore, hold that after retrial, a sentencing judge is bound, absent the justifying circumstances set out in *Pearce* and *Coke*, to follow the kind, as well as to stay within the bounds of the degree of severity, of the punishment imposed following the first trial, unless there are extremely compelling reasons which demand a change in the type of penalty in the interests of justice, in which event such reasons shall fully and affirmatively appear on the record. Thus while he may impose a lesser amount of whatever punishment was set the first time around, no exchange may be made between the various types of available penalties, except that the execution of such identical or lesser sentence may be suspended and a term of probation imposed.

[6] Accordingly in the present case the sentences imposed after retrial are declared illegal and must be and are vacated;[3] the order of the district court is reversed

[3] The appellant cites United States v. Sacco, 367 F. 2d 368 (2 Cir. 1966), as authority for the flat proposition that "an increase in a sentence may not be made after the first judgment has been entered." This is not an accurate reference: *Sacco* had nothing to do with a trial, an appeal reversal and remand for

(*Footnote continued on following page*)

[333] and the case is remanded for resentencing in a manner consistent with this opinion, that is to say, to fix sentences which are equal to or less than imprisonment for one year and one day, without the imposition of any fine, giving the appellant credit for the time during which he has been actually imprisoned.

(Footnote continued from preceding page)

new trial, and sentence after retrial. Rather it concerned a lawful and valid sentence of five years, imposed after conviction on the first count of a two count indictment, which, eight months after service of the sentence had begun, the trial judge ordered raised to seven years. This court held that this constituted double jeopardy.

In the present case the appellant is attacking a sentence which he claims is illegal and which we hold to be void and of no effect. Yet he argues that because he was serving it, he is entitled to have the seven months sentence, which is highly favorable to him, declared valid and the remainder declared invalid. But he cannot have it both ways.

Tabulation of Resolution of Counts at Second Trial

[PHOTOSTAT]

(Opposite) ☛

TABULATION OF RESOLUTION OF COUNTS AT SECOND TRIAL

Offense	Count	Auditor	Tax Return	First[1] Verdict	Second[2] Verdict	Sentence
Bribery (18 U.S C. §201)	1	Clyne	Willette ('59)	None	Acquittal	
" "	2	"	" ('61)	"	None	
" "	3	"	Luciani ('59)	"	Acquittal	
" "	4	"	Cohen ('59)	"	None	
" "	5	"	" ('60)	"	"	
" "	6	"	Danzig ('60)	"	"	
" "	8	DeSibio	Sills ('60)	"	Guilty	5 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
" "	9	Clyne	Newman ('59)	"	Acquittal	
" "	10	DeSibio	Alfredo ('60)	"	Guilty	5 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
" "	11	Clyne	Friedman ('60)	"	None	
" "	12	"	Huttick ('60)	"	"	
" (18 U.S.C. §201(b))	14	"	Kleppel ('61)	"	-[4]	
" "	16	Coady	Kaiser ('62)	"	-[4]	
Payment for Audit (18 U.S C. §201(f))	18	Clyne	Kleppel ('61)	None	Guilty	2 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
"	20	Coady	Kaiser ('62)	"	"	2 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
Aiding and Abetting Agents' illegal receipt of payments from Barash (18 U S C. §2 and 26 U S.C. §7214(a)(2)	21	Clyne	Willette ('59)	Guilty	--	9 mos. imprisonment; fine, $1,000., committed[5]
"	22	"	" ('61)	"	--	"
"	23	"	Luciani ('59)	"	--	"
"	24	"	Cohen ('59)	"	--	"
"	25	"	" ('60)	"	--	"
"	26	"	Danzig ('60)	"	--	"
"	28	DeSibio	Sills ('60)	"	--	"
"	29	Clyne	Newman ('59)	"	--	"
"	30	DeSibio	Alfredo ('60)	"	--	"
"	31	Clyne	Friedman ('60)	"	--	"
"	32	"	Huttick ('60)	"	--	"

FOOTNOTES RELATING TO TABULATION

1. The first verdict was returned by the jury, over objection, on the second day of deliberation after the Court's supplementary charge in response to the jury's questions

	16	Coady	Kaiser	('62)			
Payment for Audit (18 U.S.C. §201(f))	18	Clyne	Kleppel	('61)	None	Guilty	2 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
"	20	Coady	Kaiser	('62)	"	"	2 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
Aiding and Abetting Agents' illegal receipt of payments from Barash (18 U.S.C. §2 and 26 U.S.C. §7214(a)(2)	21	Clyne	Willette	('59)	Guilty	--	9 mos. imprisonment; fine, $1,000., committed[5]
"	22	"	"	('61)	"	--	"
"	23	"	Luciani	('59)	"	--	"
"	24	"	Cohen	('59)	"	--	"
"	25	"	"	('60)	"	--	"
"	26	"	Danzig	('60)	"	--	"
"	28	DeSibio	Sills	('60)	"	--	"
"	29	Clyne	Newman	('59)	"	--	"
"	30	DeSibio	Alfredo	('60)	"	--	"
"	31	Clyne	Friedman	('60)	"	--	"
"	32	"	Huttick	('60)	"	--	"

FOOTNOTES RELATING TO TABULATION

1. The first verdict was returned by the jury, over objection, on the second day of deliberation after the Court's supplementary charge in response to the jury's questions but before the Allen charge. (A. 1044a-63a).

2. The second verdict was returned by the jury, over objection, later on the second day of deliberation after the Court's supplementary charge and after the Allen charge. (A. 1064a-70a).

3. Prison sentence and probation are concurrent on Counts 8, 10, 18 and 20; fines are cumulative and not concurrent with each other or any other part of the sentence on any count. (A. 27a).

4. A post-trial judgment of acquittal was entered by the Court below on Counts 14 and 16. (A. 28a).

5. Prison sentences imposed on Counts 21 through 26 and Counts 28 through 32 are concurrent; the committed fines are cumulative and not concurrent with each other or any other part of the sentence on any count.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court house in the City of New York, on the fourth day of November one thousand nine hundred and seventy. Present:

HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID BERNARD BARASH, *et al.*,
Defendants,

DAVID BERNARD BARASH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

United States Constitution and Statutes Involved

UNITED STATES CONSTITUTION, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, UNITED STATES CODE, Secs. 4161-4

§ 4161. *Computation generally*

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

Five days for each month, if the sentence is not less than six months and not more than one year.

Six days for each month, if the sentence is more than one year and less than three years.

Seven days for each month, if the sentence is not less than three years and less than five years.

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.

June 25, 1948, c. 645, 62 Stat. 853; Sept. 14, 1959, Pub.L. 86-259, 73 Stat. 546.

§ 4162. *Industrial good time*

A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

In the discretion of the Attorney General such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence.

June 25, 1948, c. 645, 62 Stat. 853.

§ 4163. *Discharge*

Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such

deduction shall be entered on the commitment by the warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. If such release date falls on a holiday which falls other than on a Saturday, Sunday or Monday, the prisoner may be released at the discretion of the warden or keeper on the day preceding the holiday.

June 25, 1948, c. 645, 62 Stat. 853; Sept. 19, 1962, Pub.L. 87-665, 76 Stat. 552.

§ 4164. *Released prisoner as parolee*

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

June 25, 1948, c. 645, 62 Stat. 853; June 29, 1951, c. 176, 65 Stat. 98.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1046

DAVID BERNARD BARASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was tried and convicted on multiple counts charging bribery of Internal Revenue Service employees, and was sentenced to a year and a day concurrently. His conviction was reversed, 365 F. 2d 395 (C.A. 2), and petitioner was retried and again convicted on various counts. Petitioner was then sentenced to concurrent terms of nine months imprisonment and fines totalling $11,000 on eleven counts; to concurrent terms of five years, suspended, five years probation, and fines totalling $5,000 on two other counts; and to concurrent terms of two years, suspended, and fines totalling $5,000 on the remaining two counts. That

413-329—70

conviction was affirmed, 412 F. 2d 26 (C.A. 2), certiorari denied, 396 U.S. 832.

Petitioner then sought a reduction of sentence in the district court. The nine month concurrent prison terms were reduced to seven months, but the remainder of the sentence was not altered. On appeal from this ruling, the Second Circuit, on the authority of *North Carolina* v. *Pearce*, 395 U.S. 711, and *United States* v. *Coke*, 404 F. 2d 836 (C.A. 2), voided the entire sentence imposed at the second trial. The court concluded that "*Pearce* and *Coke* prohibit * * * an increase in the punishment imposed after a conviction on retrial regardless of the form of punishment, whether it is imprisonment, suspended sentence with probation, fine, * * * or any other corrective measure the court may provide," and held that the "sentencing judge is bound * * * to follow the kind, as well as to stay within the bounds of the degree of severity, of the punishment imposed following the first trial * * *." Accordingly, the court remanded the case to the district court for resentencing, with instructions "to fix sentences which are equal to or less than imprisonment for one year and one day, without the imposition of any fine, giving [petitioner] credit for the time during which he has been actually imprisoned." *United States* v. *Barash*, 428 F. 2d 328, 331–333 (C.A. 2) (Pet. App. 7a–15a, at 12a, 14a, and 15a). On remand, the district court sentenced petitioner to concurrent terms of ten months on all counts, with credit of seven months for the time actually served. Petitioner again appealed, and the court of appeals affirmed (Pet. App. 1a–6a).

Petitioner contends here, as in the court below, that the ten-month term constitutes double jeopardy because he had completed serving the seven-month imprisonment portion of his second, albeit illegal, term before imposition of the final ten-month sentence. He further argues, relying on *North Carolina* v. *Pearce*, *supra*, that the ten-month sentence denies him due process. But the second sentence was voided in its entirety by the court of appeals, which then instructed the sentencing judge to impose any sentence of the same type as, and not more severe than, the original sentence of one year and one day—and the final ten-month sentence clearly complies with this direction. And the second sentence included, in addition to imprisonment, fines and suspended and probationary sentences, none of which had been imposed in the original sentence. Thus, as the court below suggested in overturning the second sentence, that sentence in a real sense was more onerous than the original sentence—and perforce, than the final sentence. In these circumstances, the final sentence is not double jeopardy as to petitioner and does not deny him due process.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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